

Concluding observations: three core points

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EU environmental legislation: legal perspectives on regulatory strategies

Chapter:

Concluding observations: three core themes

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Concluding observations: three core themes

1. Introduction to the core concluding themes

The aim to achieve a high level of environmental protection concerns a complex, wide domain that for example encompasses issues related to water, air, soil, noise, chemicals, species, and landscape. Environmental policy is entrenched with technical complexities and, often, uncertainty about the potential effects of certain actions or substances. While law can be seen as a crucial tool to develop protection against deterioration of the environment, it is no easy matter to decide on the best form of legal instruments. What kind of regulatory tools are fit for a certain environmental problem? What kind of legally enforceable substantive and procedural rights should be given to citizens and environmental Non-governmental organisations? How can we make environmental law coherent and accessible?

Given the complexity and wideness of the whole environmental problem, the ideal of a clear, transparent, and easy to understand legislative package is illusionary. The complexity and incomprehensiveness of the EU environmental legislative package is a core concern, primarily for those who need to work with it in practice. In this vein, we can see the emergence of specialists in the field EU water law, EU climate law, and EU nature conservation law.¹ This book attempts to contribute to a cross-cutting debate on EU environmental law by examining EU environmental legislation from a legal perspective. Based on the in depth discussions in the previous chapters, the following issues emerge as core themes to be discussed in this concluding chapter:

- law as an instrument in order to steer towards environmental behaviour (section 2);
- the need for a coherent law (section 3);
- and, finally, law as a guarantee by means of enforceable rights for citizens and environmental non-governmental organizations, thereby providing a tool for making environmental legislation effective (section 4).

These three different themes will be highlighted in the next sections, after which section 5 concludes.

2. Law as an instrument

¹ See for a critical discussion and the need for environmental legal scholarship Fisher ao (2009) p 240-241.

A legal perspective on flexibility

Without flexibility there could not exist a European Union. The strive to include a governance style into environmental directives, for which the term Governance Mode Directive has been used in the chapter by Van Holten and Van Rijswick, aims at providing large flexibilities to Member States thereby contributing to legitimacy and enabling to take into account regional and local circumstances. Such directives offer more flexibility by increased policy discretion and they contain often more procedural provisions. Von Homeyer, discussing the coexistence of different governance regimes within the EU, has indeed argued that EU decision-making regimes that strongly rely on legislation have been weakened.² Van Holten and Van Rijswick however argue that the governance approach is not always as flexible as one might think, and that the differences between Classical Directives and Governance Mode Directives can be modest. Moreover, they warn for potential negative consequences of providing flexibility in EU environmental legislation, which are a potential harm to the effectiveness and the legal legitimacy of EU environmental legislation. Whether Governance Mode Directives will lead to an effective environmental protection depends on the ambitions of the Member States and the attitude of the courts. In that respect, Van Holten and Rijswick point at the importance of case law that may tell us what can really be achieved by procedural provisions. Both authors even warn for a deathblow of the governance approach because it will become fully implausible to argue that the effectiveness of environmental legislation will improve, in case the obligations following from environmental law will be less easy to enforce.

An important key characteristic of environmental law is that it is often not clear what kind of governmental steering is necessary. For instance, in the field of adaptation to climate change, discussed by Keessen, one can see that there is consensus that there should be some planning and policy development to adequately respond to a changing climate, but at the same time no template can be given that would be applicable throughout the EU. As Keessen states, 'adaptive management' is needed, not only to deal with the increasing complexity of governmental tasks in the field of environmental law but also in view of the need to deal with uncertainty and local characteristics. Keessen argues that this fits nicely with a procedural, programmatic approach that is adopted in for instance the Floods Directive (Directive 2007/60/EC). It appears likely that the Floods Directive will lead to assessments of flood

² Von Homeyer (2009).

risks by Member States, but will not necessary lead to national measures to reduce flood risks. According to Keessen, the problem with adaptive management is that it appears to run counter to the mission of law to provide legal certainty and stability. Indeed, one can even question whether EU environmental law by only asking Member States to map and to report, without prescribing substantive requirements, may feed national resistance against such laws. After all, it may be argued that EU legislation does nothing more than asking for reporting, mapping and assessing, thereby imposing huge administrative costs on Member States. A crucial and typical EU relevance is however that as soon as certain transboundary influences may occur, as is the case with transboundary waters for which the infrastructural measures regarding the water management can be fine-tuned across the border, particularly in view of protecting states to which the river flows, there is a typical need for EU legislative action. Keessen has shown however that the current Floods Directive does not provide substantive protection to potential victim states.

It would be false to conclude that the governance style is the common characteristic of EU environmental legislation. In the field of greenhouse gas emissions reductions, discussed by Peeters, a huge integration took place by establishing an EU wide emissions trading scheme that relies on a very much centralized EU decision-making procedure for the allocation of the tradable allowances and on rules for monitoring and enforcement, to be applied by Member States. While there is in this respect hardly room for maneuver for the Member States, there is however a large flexibility given to the industrial actors by means of the emissions trading regime; we qualify this as *market flexibility*. The private actors have the freedom to choose how much they are going to pollute, depending on a consideration of the potential price of the tradable allowances on the market and the costs for avoiding emissions. This has added another ‘governance’ approach, this time a market based governance approach, to current ones, thereby not replacing existing ones.³ As Peeters argues, the use of this type of governance by means of emissions trading has to be backed up by sound monitoring and enforcement. In this sense, under the assumption that Member States monitor and enforce the rules that establish the greenhouse gas allowance market, the given flexibility towards operators should not endanger the environmental effectiveness of the Directive. As Peeters has discussed, however, the EU has chosen to introduce complementary instruments to the EU Greenhouse Gas Emissions Trading Schemes particularly the Renewable Energy Directive (2009/28/EC) and the Energy Efficiency Directive (2012/27/EU). Hence, while the

³ The layering of governance styles is already discussed by Von Homeyer (2008).

ambition of the Directive for greenhouse gas emissions trading can be debated, other instruments have been introduced that at least partly pursue the same goal: the reduction of greenhouse gases. This policy mix introduced on the EU level requires Member States to develop many different actions in order to reach compliance. Particularly the Renewable Energy Directive leaves therewith considerable choice to the Member States: they need to develop support schemes and administrative procedures in order to comply with the imposed renewable energy target. Peeters questions whether the introduction of a number of instruments is really necessary and she points at the problem for Member States to implement all those laws. In that sense, the instrument mix hence may endanger the effectiveness of EU climate and energy law.

Next to the development of new governance approaches within directives, there is also an emerging practice of strategies outside the legal framework of Directives. As Bogaart has shown, the Common Implementation Strategy (CIS) takes place entirely outside the legal framework of the Water Framework Directive (2000/60/EC) and concerns a cooperation of the Commission and public and private actors, among which stakeholders and experts. Because of this cooperation between different levels of governance, the CIS is generally considered as an important new governance form. CIS provides for a platform for sharing experiences and for mutual learning and its main objective is to allow, as far as possible, a coherent and harmonious implementation of the WFD. The most important activity of this network is the development of guidance documents. Bogaart argues that it is imaginable that they contain far-reaching requirements. Therefore, although soft law, they may be an important factor in the ultimate environmental effect that can be achieved by the Water Framework Directive.

On balance, EU environmental legislation contains a wide variety of steering approaches, roughly varying from Classical to Governance Mode to Market Based. The crucial characteristic here is that EU environmental legislation is mostly about imposing obligations on nation states, and that Member States may feel the need to keep discretion themselves. As a result of this, flexibility for Member States can be found in a very nuanced way through different provisions. This leads us to conclude that there is a need to develop taxonomy of the different steering types in order to show in a more theoretical way which different styles are embedded in EU environmental legislation. The legal consequences of these different steering styles can then also be better examined. Such a comprehensive study could also disclose whether there is more flexibility than integration in EU environmental legislation. Governance and flexibility may however never be an excuse for less ambitious

environmental laws, and there is a need to keep a critical eye on the achievement of the central aim of EU environmental law, which is the achievement of a high level of environmental protection.

Instrument choice

Despite the discussion on flexibility, one can also notice that in several EU environmental directives regulatory tools are being prescribed that have to be applied by Member States towards polluters. In this respect, many different regulatory instruments are being used in EU environmental legislation, ranging from classic control and command approaches to market based instruments and communication instruments, like labelling. All these regulatory approaches have their own specific characteristics and potential legal problems. This diversified “instrument package” is a core characteristic of EU law. This can be clearly illustrated with the EU greenhouse gas emissions trading instrument (discussed by Peeters) and the integrated environmental permit (discussed by Oosterhuis and Peeters). The IPPC-directive (2008/1/EC) requires a “command and control” regulatory instrument by means of integrated permit linked to a best available technology requirement. This regulatory approach, prolonged by the Industrial Emissions Directive (2010/75/EU), starts from the idea that throughout the EU the same technical standard should be applied, which is contrary to an economic perspective that would argue that fine-tuning is needed in order to choose optimal approaches that would reach an overall economic benefit. On the other hand, the most far going market based approach, the EU emissions trading scheme, has met quite some criticism and hence can also not be seen as the super model for the regulation of emissions. One can hence easily conclude that the choice of the right regulatory instrument in order to steer polluting behaviour is still a challenge. Oosterhuis and Peeters have recommended that more empirical data are needed in order to be able to assess the performance of for instance the integrated permit idea. More evidence is needed to answer the question of whether the best available technology approach really reaches the aim of an integrated approach (in the sense of environmental integration), and to what extent case-specific considerations are to be made by the permitting authorities in order to fulfill the ultimate aim of the protection of the environment as a whole. They even question the concept of environmental integration as such: to what extent is that really reachable and beneficial in practice?

As Fisher and others have stressed, law should not be viewed as a “plug and play” instrument and the functioning and effectiveness of environmental legislation can only be understood on the basis of an analysis of its wider legal context thereby examining the

specific legal institutions, competences and principles.⁴ The choice of regulatory instruments cannot be seen as a technocratic exercise taken place in a clean clinic. EU environmental legislation is in this respect also an expression of changing views on how to govern in Europe. In case where the Governance Mode Directive is being employed, the instrument choice is often left to the Member States, while with the more classical directives the regulatory tools are to quite some extent being decided on the EU level.

Groothuijse and Uylenburg investigate in their contribution the flexibility of EU directives by looking at the freedom for Member States to make regulatory choices, particularly the choice for a programmed approach to achieve environmental quality standards laid down in EU directives. In a programmed approach, measures aimed at reaching the standards on the one hand and economic developments on the other hand, are balanced. With this approach it is possible to allow polluting activities as long as it is assured that the environmental quality standard is achieved at the end of the given term. It is not surprising that when a Directive leaves the choice of instruments to the Member States a programmed approach is preferred. The authors show that when a directive requires having source-based instruments in place, like permissions with emission limit values based on best available techniques, a programmed approach is in fact supported by a link made between the source based instruments and the environmental quality standard laid down in the EU-directive. This means that the achievement of an EQS should be linked to a plan or programme and not to the case-based permissions of separate projects. They furthermore conclude that a programmed approach is supported by EU directives in which clear and harsh deadlines are given for achieving the EQS. The way the programmatic approach is legally established in the Water Framework Directive could be used as a model for future EU and national legislation aimed at the achievement of EQSs.

Competences and flexibility

Finally, we observe an interesting relationship between on the one hand the competence for adopting EU environmental legislation and on the other hand the amount of flexibility included into the adopted regulatory measure. The environmental competence of the EU originates from the Single European Act from 1987 and has developed via the Maastricht Treaty, the Amsterdam Treaty and the Lisbon Treaty into a broad competence to adopt environmental measures along the ordinary procedure with consultation of the Economic and

⁴ Fisher (2009) p 233.

Social Committee and the Committee of the Regions. Particularly after the Maastricht Treaty that introduced qualified majority voting in the Council a shift took place from the internal market competence to the environmental law competence, now article 192 TFEU.⁵

Following Article 192(2) TFEU, the Council can only decide with unanimity on some specified topics, together with a consultation of the Parliament. Interestingly, the legal basis for environmental decision-making can have an impact on the discretion left to Member States. An example in this respect is article 194 TFEU, from which follows that measures that for instance promote energy efficiency and energy saving and the development of new and renewable forms of energy shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to article 192(2)(c) TFEU. This basically means that EU measures based on article 194 TFEU should leave full discretion towards the Member States on these issues, unless the measure can be based on Article 192(2) TFEU. One can hence say that the competence description of article 194 ensures discretion of Member States. Also in case of Article 192(2) – that prescribed unanimity voting in the Council - flexibility for Member States seems to be ensured. The requirement of unanimity voting in the Council entails that a Member State can ask for a lot of discretion and flexibility to be part of the EU legislation, knowing that it otherwise would veto the directive.

3. Coherency

Coherency and internal integration

As soon as multiple regulatory instruments are introduced in order to achieve the ultimate goal of a high level of environmental protection, the question of coherency emerges.

Coherency is needed in order to avoid conflicts between several regulatory approaches, and to avoid uncertainty on the applicability of specific provisions. The strive towards coherency is moreover important in order to achieve an integrated approach towards the protection of the ecosystem. The aim to undertake an *integrated* approach for achieving a high level of environmental protection has not been prescribed by the TFEU. Oosterhuis and Peeters have discussed that case law of the ECJ (now the CJEU) made clear that integration is not an absolute aim to pursue, and that the adoption of measures relating solely to certain specified aspects of the environment is allowed, provided that such measures contribute to the

⁵ Peeters (2013).

preservation, protection and improvement of the quality of the environment. According to Oosterhuis and Peeters, it will be hard to request through the court a more integrated environmental legislation. Hence, there is a relatively large freedom for the EU *legislature* to decide on how to achieve internal integration within the law. In terms of Member States' obligations, however, Van Kempen has pointed at case law of the CJEU where, in the course of the assessment of the question whether Ireland failed to implement the Birds Directive (Directive 79/409/EEC, now 2009/147/EC) the Court has referred to the need of getting a '*coherent whole*'.⁶ In this specific case, it was found insufficient if a Member State takes several partial, isolated measures not all of which are actually meant to achieve the result of the obligation as prescribed by the Directive. In conclusion, it is clear that a Directive can prescribe a Member State that it has to pursue coherency in its implementation measures, and when it does, the Court may test according to this aim whether the implementation of the Directive is correct.

Comprehensive law system

Beijen clearly attempts to provide means for improving the coherency of EU environmental law. She states that EU secondary law does not form a comprehensive system of environmental law and she argues that fine-tuning of terminology is a powerful tool in order to achieve coherency of the law. In this vein, she explores whether the development of an *Environmental Framework Directive* would be an optimal form of reaching coherency of terminology. She doesn't go that far that she proposes a Regulation, which would prevent problems concerning implementation and would avoid differences between Member States. In her opinion, it is important that the key terms have to be implemented into the national legal systems and that Member States keep discretion to fit them within their own legal system. A Directive better suits these requirements. Practical research towards national environmental legislation can show to what extent such discretion is needed or wished for by Member States. Some countries have already an Environmental Code (France, Sweden, The Netherlands) while other countries have a more sectoral environmental legislative package (Germany). It will be interesting to study whether a Common EU Environmental Law terminology requires amendments of national legislation. It is not excluded that Member States will move to static references to the terminology in the Directive. There might be a legal reason for Member States to follow precisely the definitions of the Environmental Framework Directive, since if

⁶ Case C-418/04, *Commission v Ireland* para 191.

a national oriented definition will be chosen there might be a risk of not having implemented the Directive in a correct way.

Beijen claims that the Environmental Framework Directive should contain definitions of core terms. This terminology should then be used in all other (new) European environmental legislation, for example when revising existing Directives. In the course of developing the Environmental Framework Directive, it needs to be decided exactly which terms will be codified. Should for instance the term “environment” be defined, and should the definition then be exhaustive or non-exhaustive?⁷ Another question is to what extent common definitions are possible: the greenhouse gas permit applied in the EU Greenhouse Gas Emissions Trading Scheme is of a very different character than the permit prescribed by the Industrial Emissions Directive. Furthermore, one can wonder whether the definition of a permit in the sphere of environmental law will also be useful for the use of this term in other fields of EU law. Nonetheless, the debate that has been launched by Beijen regarding the option of an Environmental Framework Directive is extremely interesting. Further study and even a moot exercise for developing such a draft Environmental Framework Directive including a review of its consequences for terminology in national environmental legislation will most likely be contributive to the coherency of EU environmental law.

Also Oosterhuis and Peeters, discussing internal integration, have pointed at a lack of clarity of the term ‘integration’. This term represents the core purpose of the IPPC and IE Directive, but has not been defined in the legislative texts. Also the term ‘environment’ has not been defined in the EU Treaties nor in the IPPC or IE Directive, although there is an indication that the integrated approach mainly has to focus on emissions into air, water and soil, to waste management, to energy efficiency and to accident prevention.⁸ On the other hand, the IE Directive uses the term “the environment as a whole” which raises the question what is covered by that.⁹ Such questions regarding the meaning of core terms complicates judicial control on the substantive application by the permitting authorities. Neither the IPPC nor the IE directive provide clear legal standards against which it can be assessed whether or not integration has been achieved. If a legal requirement is vague, judicial enforcement stays necessarily weak compared to detailed legal obligations. This does not only mean that national courts are limited in testing the national permits against the core aim of the IPPC

⁷ See for an interpretation of the term “environment” Krämer (2012) p 1.

⁸ See preamble 3 of IE Directive 2010/75.

⁹ Art. 1 IE Directive 2010/75.

directive and IE directive, it also means that the Commission is limited in enforcing a substantive integrated approach through the infringement procedure.

Beijen does not limit the purpose of the Environmental Framework Directive to definitions of terms only. Instruments, such as environmental quality standards, are used in different environmental fields and deserve also, in her view, a common approach by laying it down in the Environmental Framework Directive. When thinking of an Environmental Framework Directive, it would also be interesting to develop a taxonomy of obligations that Directives impose on Member States. Van Kempen states that although it was one of the aims of the Water Framework Directive (2000/60/EC) to streamline European water legislation by repealing several old directives and thus creating a clearer set of rules for Member States, complexity has instead not been removed. He points at the fact that this is particularly caused because of a lack of clarity of concepts and terms. This means, in the words of Van Kempen, that the single obligation to achieve good water status is actually only the tip of an iceberg that is by itself very difficult to grasp. In order to gain a clear understanding of what is legally obliged, Van Kempen has analysed the difference between *obligations of best effort* and *obligations of result* and he has proposed to use clear definitions since it only then becomes clear what the real legal obligation of a Member States is. He argues that Member States might intend to interpret a certain provision as an obligation of best effort, and not of result, thereby trying to follow the least onerous obligation. The fact that the Court has not yet been addressed to provide clarity on this matter with regards to the Water Framework Directive enables such strategic interpretations in practice. In his study he has developed a methodology based on the case law of the CJEU in view of other (and older) directives in order to understand the definition of and difference between obligations of result and best effort. The first type of obligations are provisions in directives that require Member States to obtain very precise and specific results after a certain period. Obligations of best effort however are provisions that require Member States to take the necessary measures to ensure that certain objectives formulated in general and unquantifiable terms are attained, whilst leaving them some discretion as to the nature of the measures to be taken. In other words: both types intend to achieve a result, but an obligation of best efforts requires one to endeavour or do one's best to attain it, whereas an obligation of result requires one to succeed in attaining that result. In the case of an obligation of best effort, Member States are obliged to do whatever is reasonably possible. In the case of an obligation of result, Member States have to do all that is in fact possible to achieve the goal of the obligation. It is however not necessarily true that obligations of result are always more difficult to comply with than obligations of best efforts.

Reasonableness also plays a role concerning obligations of result, since it is incorporated into the exemptions typically listed in the directives themselves. Van Kempen even argues that an obligation of best efforts without any exemptions listed in the directive could be more burdensome for a Member State than an obligation of result with very generous exemptions. Obligations of best efforts do give some room for Member States to come up with their own tailor-made excuses, because they are not restricted to a limited set. It is, however, not at all guaranteed that the courts will be generous in accepting these *ad hoc* justifications, whereas they would be obliged to do so if these exemptions were listed in the directive. Finally, Van Kempen recommends to use a structured qualification method in order to increase the clarity of rules, not only those of the Water Framework Directive but also of other environmental directives. It would be interesting to conduct such a research, based on Van Kempen's methodology, regarding other environmental directives after which can be concluded whether indeed a common terminology can be provided, which then ideally can be put into the Environmental Framework Directive proposed by Barbara Beijen.

Coherency by coordination

Peeters and Oosterhuis discuss the coherency of directives in view of the co-ordination between the regulation of general industrial emissions and the specific regulation of greenhouse gas emissions. With the adoption of the Directive on greenhouse gas emissions trading a provision has been introduced meaning that the integrated permit as being required by the IPPC Directive may not include an emission limit value for greenhouse gas emissions. The rationale for this rule is that the functioning of the emissions trading instrument, and hence the freedom of operators to decide whether to reduce emissions or to buy allowances, should not be frustrated by "command and control" emission limits imposed by the IPPC permit. The authors however point at the fact that for energy efficiency, it is a free choice for Member States whether or not to include requirements into the integrated permit. It is however not clear whether the use of energy still may play a role with integrated assessment leading to the determination of *inter alia* a water or air emission limit value. Particularly when a Member States has decided to make use of the possibility not to adopt energy efficiency measures into the IPPC or IED permit, the question whether the permitting authority is still competent to take account of energy issues when defining the emissions limit values could be part of a legal dispute. Given the explicit emphasis in the IE directive on energy efficiency being part of an integrated approach, they argue that energy considerations should play a role when determining the specific emission limit value for an installation. This specific example

again illustrates what kind of legal questions can emerge if the co-ordination between directives is not clearly regulated.

The way how to develop a coherent set of rules for the environmental domain is still a question that has to be answered. The problem of reaching coherency and internal integration are not typical EU environmental law problems, but will rise in any legal system where environmental protection is tried to be achieved through law. Particularly International Environmental Law is largely characterized by its fragmentation: the amount of Multilateral Environmental Agreements is enormous and fine-tuning of terminology but also provisions largely lacks. Political scientists however will argue that a modest fragmentation is not always bad and can even have some benefits.¹⁰ In case of EU secondary environmental legislation, the typical legal point of view, as presented by Beijen, is that laws have to be coordinated in order to avoid conflict of norms, and that the meaning of terms should be as clear as possible. However, as soon as such secondary environmental legislation deliberately allows Member States to introduce different regulatory options, as is for example the case with the Framework Directives, fragmentation of law is even accepted as a wishful phenomenon, also in view of subsidiarity. To put it differently: EU environmental legislation should be as coherent as possible, but as soon as for reasons of governance flexibility is allowed for Member States, fragmentation is even seen as a positive point, facilitating better solutions in a certain area. The adoption of several laws in Member States can however lead to problems for private actors that pursue activities in different Member States. When we for instance take large energy companies that pursue activities in several Member States, such energy companies will have to deal with different support mechanisms and administrative procedures for renewable energy across Member States. The flexibility left to Member States hence goes hand in hand with larger costs for industries that operate in more than one Member State. The integration of law on the EU level would avoid that problem, but then again the possibility for reaching optimal solutions given the specific circumstances of a Member States would be reduced. After all, the debate on comprehensiveness, internal integration and fragmentation shows how challenging the design of a coherent environmental law is. Lawyers can nevertheless contribute to the effort to make the law as coherent as possible. At the same time, coherency is not the ultimate ideal to reach, but the adequacy of the law, particularly in terms of environmental protection but also in view of a justified treatment of private actors. If all polluters would be treated in the same way, this might run counter to the principle of equal

¹⁰ Biermann (2009)

treatment. Hence, different situations may ask for differential treatment, which contributes to the complexity of the law.

Framework Directives

Bogaart conducted an in depth examination of the meaning of the term 'Framework Directive'. In that sense she contributes to the wish from Beijen to develop a clear and coherent terminology in EU environmental law. The term 'Framework Directive' does not appear in the Treaties and a standard definition doesn't exist. Bogaart argues that the typical characteristic of Framework Directives is that the standard-setting is left to Member States. She proposes to reserve the term Framework Directive for flexible directives with a general character, which at least for a large part lay down open-ended standards and procedural rules on the implementation of the standards. In view of this definition, Bogaart argues that a Framework directive cannot be used to regulate air pollution, since human health necessitates a uniform approach across the EU that guarantees at least a safe environment by setting minimum air quality standards. The Air Quality Directive (2008/50/EC) can in her view not be qualified as a Framework Directive since Member States have virtually no room for discretion regarding standard setting. The Framework Directive in the definition proposed by Bogaart come close to the Governance Mode Directive as being discussed by Van Holten and Van Rijswijk, but the latter term is broader, since it focuses on the question whether the Directive tries to enable flexibility, also in view of reaching environmental standards set by the Directive. The latter authors hence discuss in their chapter whether the advantages of including a governance style will be achieved, thereby applying a legal perspective, while Bogaart tries to come up with a definition of the Framework Directive. According to Bogaart, the Marine Strategy Framework Directive (2008/56/EC) in any case rightly deserves the title framework directive, since objectives must be totally fleshed out at the regional level. The Water Framework Directive, on the other hand, seems to combine characteristics of a framework directive with a normal directive, since it lays down EU-wide chemical objectives ('normal directive'), leaving the setting of the ecological objectives for the lower level ('framework directive'). Consequently, Bogaart is against the use of the term 'framework directive' for directives that only have a broad scope, and she also argues that policy freedom regarding the type of measures needed in order to achieve the goals cannot be regarded as a distinctive characteristic of a Framework Directive. In this sense, for instance, the Renewable

Energy Directive, discussed by Peeters, cannot be seen as a Framework Directive since the ultimate target, the amount of renewable energy to be consumed in 2020, is defined in the Directive. Interestingly, however, Member States are free to decide how to distribute this target among different sectors (electricity, heating and cooling, and transport), for which specific policy targets have to be notified to the Commission (article 4 Renewable Energy Directive). Consequently, the setting of sub-objectives needs to be done by the Member States, which, as one might argue, turns the Renewable Energy directive as far as that aspect is concerned into a kind of Framework directive. This example shows again how complicated it is to develop a good taxonomy in EU environmental law. Non-lawyers may find the discussion on what exactly is a Framework directive as rather theoretical and not contributing to a better environmental policy. Lawyers, however, adhere to trying to use the best terminology possible in order to have a high quality law that is as easy as possible to understand. Since Environmental Law is already, given its difficult substance matter and broad scope, a complex field of law, a clear use of terminology is in that sense to be recommended. The attempt of Bogaart to classify what a Framework Directive exactly is deserves in this respect appreciation, and the right terminology is of course open for further academic and political debate.

Coherency and new legislative provisions

Environmental law is far from a static field of law. When new problems arrive, the option of new environmental laws in order to address these problems will be considered and in the course of this, the need for coherency with the existing package needs to be considered.

This is illustrated in the contribution of Vogelezang-Stoute focussing on the EU regulatory approach towards nanomaterials. She addresses the 'technology control dilemma' which deals with the question of how to govern the emergence of a new technology which by definition cannot be fully characterized with respect to its potential benefits and drawbacks. She points out that new technologies raise chances to promote research and industrial innovation promoting benefits to society, but also raise challenges as to how integrate health, safety and environmental protection in the regulation. She presented three approaches to regulate the uncertainties of new technologies: an incremental approach, a nano-specific approach and a precautionary approach. An incremental approach implies that existing legislative structures are used to regulate the new technology. A product-specific approach will require more attention for coherency than an incremental approach. A precautionary approach means a comprehensive and in depth balancing of the opportunities and risk of the

new technology. This approach comes with barriers, like the costs of legislative changes and the burden that this implies for authorities and companies. The author does not indicate which approach she prefers for specifically nanomaterials, but makes clear that despite the fact that an incremental approach was firmly promoted by the EU Commission in 2004, substantive regulatory answers for governing the emerging technology have not yet been provided. She points at the need to have at least information requirements on exposure and risk, preferably by means of a public register, after which next steps for governing the uncertain risks can be developed.

Also in the field of adaptation to climate change, the question of new legislative strategies needs to be addressed. Keessen argues that a nuanced assessment has to be conducted meaning that the need for mainstreaming or even integrating adaptation policies into other EU policies depends on the impacts of climate change on a specific sector and the role of the EU in that sector. Here again lies a relationship with the competences: after all, what the EU can do to mainstream adaptation depends on its competence to act. Fine-tuning of new adaptation provisions with existing EU legislation is relatively uncomplicated when adaptation to climate change is in line with the policy goals of that EU legislation. She argues that it is also possible that mainstreaming takes place by inserting adaptation provisions into legislation made for other purposes, but she points at the fact that the specific competence of the EU in the specific policy field need to be considered. For instance in the field of health, the EU is only competent to take supplementary action, and hence the adaptation provisions need to stay limited in that respect as well. In case of environmental law, however, the adaptation provisions seem to fall easily within the competence reach. Adaptation efforts can fall within the aims of Article 192(1) in view of the protection of the environment, human health and to promote sustainable use of natural resources. She also argues that a potential Adaptation Directive should not be used as a mainstreaming instrument, but could be used as a supplement to mainstreaming by adapting existing law. Keessen, however, points realistically to the fact that if the EU opts for mainstreaming where possible, this entails amending Directives and Regulations which is a complicated and time-consuming process.

Coherency and instrument choice

In contrast to the rise of Directives that try to bring all relevant legislation in one domain together (like the Water Framework Directive) and to integrated permitting, an almost incomprehensible package of laws has been established in the field of climate and energy with

moreover remarkable and not necessarily beneficial interplays between the instruments. Peeters critically discusses whether the EU has adopted an appropriate instrument mix, or is in fact applying an instrument mess.¹¹ Reducing the instruments applied at the EU level would lead to more coherency, simply by using less rules. The ambition towards climate protection can be assured by imposing strict caps under the EU Greenhouse Gas emissions trading scheme and the Effort Sharing Decision (Decision 406/2009). If carbon emissions get a price, renewable energy and energy efficiency measures will become more favorable, and less regulatory instruments are needed.

4. Rights and their contribution to the Effectiveness of Environmental Legislation

Direct effect of substantive provisions

The trend towards including governance modes in Directives leads to less substantive rules in EU environmental legislation. While citizens and particularly Environmental Non Governmental Organizations can try to influence environmental protection through public participation rights they are provided with less tools to enforce environmental protection. In other terms, EU environmental law is not largely characterized by the conferral of substantive environmental rights upon citizens. Bogaart has discussed that the most important characteristic of Framework Directives is that the ecological objectives are set at the national or regional level. This approach obviously means that substantive directive provisions are often not precise and unconditional and as a result do not produce direct effect. On the other hand, as Bogaart has shown, a Framework directive –at least in the way how she defines it - cannot be used to regulate air pollution, since human health necessitates a uniform approach across the EU that guarantees at least a safe environment, not causing diseases or worse. Given the objectives of EU environmental law laid down in Article 191 TFEU, EU environmental legislation has at least to provide such protection that human health and the important values of the ecosystem are preserved. Whether that minimum level actually is reached – at least on paper, in view of the content of EU environmental legislation - deserves empirical evaluation by environmental scientists.

However, depending on the problem to be regulated, enforceable rights are not always provided to citizens. Vogelesang-Stoute has shown the lack of basic information on exposure and risk coming from nanomaterials. Notification, including information on basic research

¹¹ Steven Sorell, Jos Sijm (2003) : “a policy mix may easily become a policy mess” , p 434.

data, and a public register should be basic provisions regarding the regulation of nanomaterials, thereby enabling consumers to make informed choices. Voegelzang-Stoute argues that that more transparency can be a basis for next governmental steps. Also Keessen discussed information requirements and she argues that the requirements from the Floods Directive may succeed in obliging the Member States to assess flood risks and create maps and plans, but this will probably not result in State measures to reduce flood risks. The Floods Directive does no more than ensuring that they have the opportunity to know the flood risks. Although the Floods Directive states that flood risk plans have to include measures to achieve the objectives, it does not oblige Member States to arrive at a certain level of flood safety. Keessen shows that the position of citizens with regard to flood risks is even worse compared to Janecek which concerned enforcing compliance with given EU air quality standards. Citizens who live in flood prone areas do not have an EU standard of acceptable flood risk to rely on. Also in a broader sense regarding adaptation provisions in EU legislation, Keessen foresees that citizens might only be entitled to information and participation in the establishment of adaptation plans and not to the achievement of concrete results, such as a reduction of flood risks or the urban heat island effect.

Since the problem of adaptation is new and the real climate change effects in a certain area are hard to predict, a flexible and procedural approach seems to be preferred. One can here however expect that the gap that these flexible approaches leave regarding adequate protection for citizens may be filled in, at least partly, by human rights. Particularly for instance where floods, heat waves and landslides could threaten the life and well-being of citizens Member States have to respect the ECHR rights.¹²

Van Holten and van Rijswijk have provided interesting insight into the legal protection given by a traditional Directive, an in-between Directive and a Governance Mode Directive. They argue that effectiveness of European environmental law is not only achieved by increasing input legitimacy, but also by increasing effective legal protection. For the latter, the concept of direct effect and hence the use of unconditional and sufficiently precise terms is in that respect of great importance. Governance Mode Directives aim at giving provisions which give a high level of discretion to Member States, and, consequently, such provisions are then consequently not 'unconditional and sufficiently precise'. In that case individuals can only rely directly on the limits of the discretion of the Member State, as set by the provision,

¹² Gouritin (2011)

in national court. As case law has taught, these limits have to be sufficiently precise in order to invoke direct effect.

Complexity, clarity and effectiveness

Both complexity of European environmental law and lack of clarity can have their consequences for the effectiveness of law. Van Kempen argues that European environmental law has become increasingly complex and at times lacks the clarity to allow for effective implementation and thus effective environmental protection. He points at the fact that situations emerge in which Member States do not know what exactly they are obliged to do. Particularly regarding clarity he focuses on the potential obscurity of the legal status of directive provisions: are they obligations of best efforts or obligations of result? He examines this, as a case based study, on the basis of the Water Framework Directive. This Directive has introduced new obligations and standards regarding ecological quality, and for instance its article 4 is according to Van Kempen notoriously complex. The wording deviates from older environmental directives, leaving its interpretation even more unclear. His chapter shows that confusion about terminology, already discussed in section 3 of this chapter, threatens the effectiveness of the law.

While Van Kempen takes an in depth discussion of the provisions of one Directive, even focusing on one Article of that Directive, Peeters has discussed the problem of executing a set of different regulatory instruments in one environmental field, that of climate and energy. The establishment of many laws that ask for intense governmental action in order to conduct *inter alia* permit systems, support mechanisms, and monitoring and enforcement may entail the risk that difficulties emerge with the execution of the climate and energy laws. A simpler instrument approach seems more effective. In that sense, she proposes to examine whether a more inclusive approach can be developed in the EU by means of an ambitious carbon market that includes all carbon emitters. The benefit would be that the amount of instruments can be reduced, and that the administrative execution of climate law will be simplified, and core tasks, like monitoring and enforcement, can be better executed.

Discretion and procedural rights

It would however be short-sighted if the legal discussion would only be concentrated on the wish for clear defined substantive rights. Van Holten and Van Rijswijk point at the fact that involvement of the members of the public in the course of standard-setting or the design of

measures to reach such standards can significantly increase the public backing of European environmental law. In this sense, Governance Mode Directives that require extensive public participation can contribute to so called input-legitimacy. However, these authors rightly state that public participation cannot only be contributed to governance. Participation is a basic principle in environmental law since the adoption of the Aarhus Convention and is one of the principles of good governance. In this sense, procedural rights have become a fundamental layer of EU environmental legislation, and further debate is needed on the actual design and application of these rights both on the EU and national level. However, as may be clear, as soon as particularly substantive environmental provisions lack in EU environmental legislation, procedural rights are extremely important, particularly when Member States have to set standards for environmental protection. Empirical research towards the influence of the use of procedural rights towards the level of environmental ambition in national decisions has to show what the real role of these rights is.

Equal Treatment

Some contributions have pointed at the legal principle of equal treatment. Peeters discusses the consideration of the Court of Justice of the EU to put all greenhouse gas emitters on the same footing: they are all to be seen as polluters.¹³ This does not mean that differential approaches cannot be applied by the EU legislator but such differentiation needs to be based on objective and transparent criteria. Hence, based on objective reasons, some industries may have higher burdens than others. One could even imagine that a legislator would differentiate among necessary and luxury emissions, meaning that the latter would be treated more severely. The starting point, however, should be that all greenhouse gas emitters should be included in the regulatory framework. The legal debate will then focus on the question who has to pay how much. The principle of equal treatment, to which is inherent that different situations should not be treated equally unless this can be justified, is then a legal reason why still some fragmentation has to take place in the regulatory approach. Also in view of the IPPC and IE directive equal treatment considerations pop up, particularly in view of applying the same technological standards to an industrial sector across the EU. Oosterhuis and Peeters comment upon the alignment of environmental performance requirements for industrial installations, and state that *market integration* by means of a level playing field has become part of the integrated permitting approach, which not necessarily means that an optimal

¹³ See also earlier Peeters (2009).

environmental integrative approach is being reached. They point at the fact that case-specific assessments by permitting authorities may enable the determination of optimal solutions for environmental protection (which can serve as justification for differential treatment) but also acknowledge that more discretion for permitting authorities may lead to bargaining processes on the individual level. Procedural rights, as just discussed, but also inspection mechanisms towards the functioning of permitting authorities may be useful provisions to counterbalance that threat.

Van Holten and Van Rijswick finally discuss equal treatment from the perspective of citizens. They argue that legitimacy enables equality, particularly regarding the same minimum of environmental protection level for all EU citizens. By laying down substantive minimum standards equal treatment of EU citizens in terms of living in a sound environment can be ensured, of course under the condition that citizens have the possibility to address the court.

5. Final conclusion

Reviewing the themes that emerge from the chapters to this book, a few final observations can be made. First of all, it is confirmed that lawyers like to discuss about text and terminology. This explains why ample attention has been given towards developing more coherency across EU environmental law, particularly by means of developing a common terminology.

Furthermore, the preference of lawyers for legal certainty explains the critical approach towards the governance style by Van Holten and Van Rijswick after having examined the legal effectiveness of provisions in Governance Mode Directives by testing them on their potential direct effect. However, the discussions also show that the contributing authors realise that EU environmental law cannot follow a top down approach where all terms and provisions are prescribed in a detailed and clear way. Given the special character of the EU, that basically unites different legal systems from nation states with different economies, the option of leaving discretion to Member States should not be excluded and is in fact in the heart of EU environmental legislation. Hence, lawyers studying EU environmental law need to balance between on the one hand their wish for clear EU environmental legislation that avoids interpretation problems with preferably where possible providing enforceable substantive rights to citizens, with on the other hand the values embedded into the subsidiarity and proportionality principle. These principles contribute to the Governance Mode where it is aimed to find solutions on national levels and even sub national levels where democratic

decision-making and moreover the engagement of citizens and Environmental Organisations have to play a role for increasing legitimacy and providing fine-tuned and adequate solutions.

In this book, and also in this concluding chapter, we have tried to stay modest in our attempt to get a better understanding of the legal quality of EU environmental legislation and to further environmental law scholarship. The complexity of EU environmental law makes a comprehensive discussion of its quality and performance very difficult. Already single issues like the meaning and application of the precautionary principle, the concept of direct effect, the value, design and application of emissions trading, and the value and design of public participation procedures or access to environmental information, have been discussed in numerous articles and books. While it has become already difficult to become an expert in for example EU climate and energy law or EU nature conservation law, it is almost impossible to come to full grips with the whole area of EU environmental legislation. We hence have put forward observations and ideas, all based on the wish that EU citizens may live in a beautiful and sound environment.

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